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No. 06-287

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, Jr., Acting Warden, San Quentin State Prison, California, *Petitioner*,

v.

WILLIAM CLARK, *Respondent*.

ON REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
A REVERSAL OF THE NINTH CIRCUIT'S FINDING OF "*BOUIE* ERROR" NECESSARILY WOULD UNDERMINE ITS "INTERRELATED" FINDING OF *TROMBETTA* INSTRUCTIONAL ERROR AND, HENCE, WOULD CHANGE THE OUTCOME OF THIS CASE	1
CONCLUSION	4

TABLE OF AUTHORITIES

Page

Cases

California v. Trombetta,
467 U.S. 479 (1984) 2

Clark v. Brown,
450 F.3d 898 (9th Cir. 2006) 2

Estelle v. McGuire,
502 U.S. 62 (1991) 3

People v. Clark,
50 Cal. 3d 583,
789 P.2d 127 (1990) 2

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A REVERSAL OF THE NINTH CIRCUIT'S FINDING OF "*BOUIE* ERROR" NECESSARILY WOULD UNDERMINE ITS "INTERRELATED" FINDING OF *TROMBETTA* INSTRUCTIONAL ERROR AND, HENCE, WOULD CHANGE THE OUTCOME OF THIS CASE

In his brief in opposition, respondent Clark asserts that the State's petition for writ of certiorari challenges only one of two "separate" due-process grounds for habeas corpus relief found in the Ninth Circuit opinion below. He then argues that it would be pointless for this Court to grant certiorari on the challenged *Bouie-Rogers* ground because, regardless of the outcome, the Court of Appeals' judgment would still stand on the other *Trombetta* ground. (Opp. at 4, 25-26.)

Respondent, however, fails to grasp that the Ninth Circuit's finding of reversible *Trombetta* error depended entirely on the existence of the alleged *Bouie-Rogers* error.

Under the panel's logic, *Trombetta* entitled respondent to the benefit of an instruction on the "*Green* defense" as

conceptualized by the federal court—rather than the retroactively diminished effect given to it by the California Supreme Court in excusing the omission of the instruction—only because *Bouie* precluded giving effect to the state court's supposed after-the-fact retrenchment of *Green's* scope. The Ninth Circuit opinion, indeed, characterized the alleged *Bouie-Rogers* and *Trombetta* errors as "two *interrelated* due process violations" (appendix A at p. 5; *Clark v. Brown*, 450 F.3d 898, 902 (9th Cir. 2006), italics added) that *together* supported the Court of Appeals' judgment. As can be readily seen from the opinion below, the two "violations" are not only "interrelated" but also interdependent in forming a single basis for federal habeas corpus relief. (*See* appendix A at p. 15; *Clark v. Brown*, 450 F.3d at 908-909 [after finding instructional error, the Court of Appeals next turns to the *Bouie* retroactivity issue to determine "[t]he next question," namely "whether Clark was entitled, under the due process clause, to that instruction."].)

To explain it in more detail: As the California Supreme Court acknowledged (appendix C at p. 71; *People v. Clark*, 50 Cal. 3d 583, 609, 789 P.2d 127, 144 (1990)), the trial court's failure to give a "*Green* instruction" was error *under state law* because there was at least some minimal evidence in the prosecution's case to support it. But that error was undeniably harmless, and could not have amounted to a violation of due process, given the California Supreme Court's holding that Clark's own professed intent to commit arson for the deliberate purpose of driving the murder victim and other occupants out of their house constituted an "independent" purpose under *Green*. (Appendix C. at 70-71; *People v. Clark*, 50 Cal. 3d at 608-09, 789 P.2d at 144.) Under that holding, Clark's own version of the facts proved the "special circumstance" and negated any *Green* "defense" to it. So the instructional error could not have deprived Clark of a "meaningful opportunity to present a complete defense" in violation of due process. *California v. Trombetta*, 467 U.S. 479, 485 (1984).

It was only by invalidating the state supreme court's holding

on *Bouie* grounds that the Ninth Circuit became free to adopt its contrary view of the *Green* rule, under which Clark's intent to drive the residents outside failed the "independent purpose" test. Relying as a necessity upon *that* view of *Green*, the Court of Appeals found the state law instructional error violated due process.

In short, the Ninth Circuit's finding of a *Bouie* violation was necessary to its finding of a *Trombetta* due process violation based on failure to instruct on the defense theory. Without the *Bouie* error, the Ninth Circuit would have been bound by the California Supreme Court's holding that Clark's admitted purpose for setting the fires satisfied the state-created *Green* rule. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions."). Thus, contrary to Clark's argument, a reversal of the Ninth Circuit's *Bouie* finding by this Court would alter the Court of Appeal's judgment and the outcome of this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 18, 2006

Respectfully submitted,

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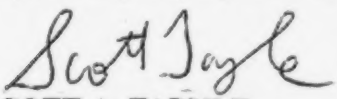

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